



Focus on Military and Veterans Law

by Hillary A. Wandler

Extended Exposure: Advising Veterans of Federal Criminal Jurisdiction Over In-Service Conduct

On June 4, 2014, former U.S. Marine Corporal

Wilfredo Santiago was convicted of making false statements to investigators about his involvement in an accidental, non-fatal shooting of Navy Hospital Corpsman Michael John Carpeso in Iraq.¹ The shooting occurred more than six years before Santiago was convicted and almost five years before he was indicted.

Santiago was still in the Marine Corps then, finishing his third tour of duty in Iraq. After first denying involvement in the shooting, he eventually admitted his M9 pistol fired while he was clearing it, sending a bullet into the Navy corpsman's temple.² Santiago was not court martialed after his admission, even though Naval Criminal Investigative Services (NCIS) fully investigated the incident while he was still in active service.

When Santiago's active service was terminated, he remained a reservist until 2011, when he was honorably discharged from the Marine Corps.³ This cut off the military's jurisdiction to prosecute him for the shooting under the Uniform Code of Military Justice.⁴ Because the shooting happened while Santiago was on foreign soil, the Department of Justice (DOJ) also lacked jurisdiction to charge him. That left only one option: a statute allowing prosecution of a former member of the armed forces for an offense committed outside U.S. territorial jurisdiction—the Military Extraterritorial Jurisdiction Act of 2000 (MEJA). Asserting jurisdiction under MEJA, the U.S. Attorney's Office indicted Santiago in the Southern District of New York in January 2013.⁵

Prosecutions under MEJA were not new. Between 2005 and 2009, the Department of Defense (DOD) had referred 100 cases to the U.S. Attorney's Office for prosecution under MEJA,⁶ including some of the most noteworthy indictments and convictions under the act. These included the indictments against civilian security guards working for the Department of State contractor Blackwater

Worldwide for the shooting in Baghdad's Nisur Square and the conviction of former Army Private Steven Green for the noncombat rape and murder of Iraqi civilians.⁷

But the nature of Santiago's prosecution, which involved an honorably discharged service member whose conduct was known and fully investigated while he could be court martialed, has caused some to seriously question MEJA's continued use against former service members. Southern District of New York Judge Colleen McMahon said that civilian jurisdiction over former service members outside the reach of court martial "came as a great surprise" to her. "[T]his law was not passed to cover the Wilfredo Santiagos of this world," Judge McMahon stated, "and its use in this context is fraught with the possibility for mischief."⁸ For veterans' advocates focused primarily on disability compensation, a client's extended exposure to criminal prosecution under MEJA could be equally as unexpected.

The Military Extraterritorial Jurisdiction Act

The Military Extraterritorial Jurisdiction Act of 2000 was primarily crafted to establish federal criminal jurisdiction over civilians employed by or accompanying the armed forces outside of the United States.⁹ This includes (1) civilian employees, (2) contractors and subcontractors, and (3) employees of contractors and subcontractors.¹⁰ Dependents of members of the armed forces and those "employed by the Armed Forces" also fall under the act's jurisdiction.¹¹

The act amended Title 18 of the U.S. Code, not by adding new sections to the crimes covered there, but by establishing jurisdiction over offenses committed outside U.S. territorial jurisdiction. It targeted conduct that would have been punishable under the Title 18 Crimes section by imprisonment for more than one year had it been

Hillary Wandler joined the University of Montana School of Law faculty in 2008 after clerking for Ninth Circuit Court of Appeals Judge James R. Browning, clerking for U.S. District Court Judge Donald W. Molloy, and practicing law with Garlington, Lohn & Robinson in Missoula, Mont. Wandler's research interests include legal issues arising for veterans suffering from psychological disabilities, procedural issues arising in civil litigation, and the intersection of legal writing and academic support instruction in law school. She is currently admitted to practice in Montana state and federal courts and the U.S. Court of Appeals for Veterans Claims, and she is accredited to practice before the Department of Veterans Affairs. Wandler continues to represent veterans in disability claims and appeals. She received her B.A. cum laude from Concordia College in Moorhead, Minn., and her J.D. with high honors from the University of Montana School of Law. © 2014 Hillary Wandler. All rights reserved.

committed “within the special maritime and territorial jurisdiction of the United States.”¹²

The act also extended federal criminal jurisdiction to former service members. First, a member of the armed forces may be prosecuted under the act if that person is no longer subject to the Uniform Code of Military Justice (UCMJ). Second, a member of the armed forces who is still subject to the UCMJ may be prosecuted under the act if at least one co-defendant is not subject to the UCMJ. In either case, the act does not disturb a military tribunal’s concurrent jurisdiction.¹³

Although foreign governments rarely prosecute U.S. citizens for crimes committed on their soil, if a foreign government chose to exercise jurisdiction, the act may preclude prosecution for the same conduct in U.S. courts. In that circumstance, if the United States recognizes the foreign government’s jurisdiction, prosecution in U.S. courts may proceed only if the attorney general approves the prosecution.¹⁴

The act authorizes DOD law enforcement officers to arrest a suspect based on probable cause. Once arrested, the accused must be handed over to U.S. civilian law enforcement “as soon as practicable.”¹⁵ Finally, even when civilian law enforcement authorities take custody of the accused, they cannot immediately remove the accused to the United States or any other foreign country without action by a federal magistrate, the Secretary of Defense, or the accused.¹⁶

A federal magistrate may appoint “qualified military counsel.”¹⁷ All initial proceedings, including arrest, detention, delivery, and removal, are governed by DOD regulations.¹⁸

The act encourages notice to foreign nationals who may be subject to U.S. criminal jurisdiction due to their work with the U.S. armed forces.¹⁹ However, it does not require or encourage notice to members of the armed forces about the potential for post-discharge criminal prosecution in civilian courts.

Legislative Intent

As Judge McMahon noted, “This law was not passed to cover the Wilfredo Santiagos of this world.”²⁰ Proponents of the act focused almost exclusively on American civilians. In the House report accompanying H.R. 3380, the Committee on the Judiciary described a “jurisdictional gap” that allowed crimes committed by American civilians—examples included sexual assault, arson, robbery, larceny, embezzlement, and fraud—to “go unpunished” when committed overseas. According to the committee, the gap was created because U.S. courts lacked jurisdiction over extraterritorial crimes and the foreign country in which the crimes were committed declined to exercise its jurisdiction “when an American [was] the victim or when the crime involv[ed] only property owned by Americans.”²¹

The report discussed how civilians employed by or accompanying the armed forces overseas were originally subject to prosecution under the Uniform Code of Military Justice.²² However, after a series of U.S. Supreme Court cases limited the code’s reach over civilians to times of congressionally declared war, the only remaining authority with jurisdiction over civilian crimes committed overseas was the foreign government of the country in which the crime was committed. Because foreign governments often waived their jurisdiction and chose to not prosecute American civilians, particularly when no person or property from the foreign country suffered damage in the crime, many crimes committed by civilians went unpunished.²³



Although the United States could bar the civilian perpetrator from its overseas military installations or terminate any contract it had with the individual, it had no ability to prosecute the individual using existing U.S. criminal statutes, which applied only to crimes committed within U.S. borders.²⁴

The committee asserted the U.S. government had two moral justifications for punishing crimes committed by civilians employed by and accompanying the military overseas. First, but for the military’s presence in the foreign country, the civilian employees and dependents would not be there. Because the military’s presence in the foreign country was a factor that made these crimes possible, the committee asserted the government had a clear interest in punishing the civilians who committed the crimes. Second, the committee found the government was morally justified in using U.S. law to punish anyone who harmed an American victim or property.²⁵

In addition to these moral justifications for the act, the committee noted the practical consequences of allowing civilian crimes committed overseas to go unpunished. Robert E. Reed, DOD associate deputy general counsel, noted negative consequences the military had already experienced and anticipated could still develop from allowing civilian crime to go unpunished. These included decreased deterrence, morale, and discipline in the overseas military community; “the strong potential for embarrassment in the

international community”; expected increase in hostility in local communities where the military was stationed; and the potential for damaged relationships between the United States and its allies.²⁶ In the same hearing, Roger Pauley of the Department of Justice noted that in some recent peacekeeping missions, foreign host nations had been reluctant to enter into agreements that would cede jurisdiction over U.S. civilians in the country with the military “because of awareness that the United States lack[ed] statutory mechanisms to exercise such jurisdiction.”²⁷

While the number of DOD civilian contractors overseas has been steadily declining since 2008, the percentage of civilians in the United States’ deployed force remains significant—enough of a presence to justify vigorous enforcement of extraterritorial criminal jurisdiction over civilians.

Rep. Steve Chabot (R-Ohio) spoke in support of H.R. 3380, asserting: “This bill fills the jurisdiction gap in the law that has allowed rapists, child molesters, and a variety of other criminals to escape punishment for their crimes.”²⁸ Sen. Saxby Chambliss (R-Ga.) also spoke in support of the bill, providing several examples of crimes that had gone unpunished because of the jurisdictional gap, all of which were committed by civilians:

Let me give you just a couple of examples of the problem our military faces. In one instance, a Department of Defense teacher raped a minor and videotaped the event. The host country chose not to prosecute, and our government did not have jurisdiction to prosecute the teacher.

In another case, the son of a contract employee in Italy committed various crimes, including rape, arson, assault, and drug trafficking. Again, because of a lack of jurisdiction to prosecute, as a punishment for these criminal acts the son could only be barred from the base.

Finally, an Air Force employee molested 24 children ages 9 to 14. However, because the host country refused to prosecute, the only recourse was again to bar this individual from the base. Certainly these flimsy punishments do not match the seriousness of the crimes these individuals committed.²⁹

No proponent of the act offered examples of unpunished crimes committed by former members of the armed forces.³⁰

Continuing Focus on Civilian Employees and Dependents

Proponents of this extended jurisdiction have focused and continue to focus on civilians employed by and accompanying the armed forces, which is understandable given their longtime routine presence in military missions. In 1979, the U.S. General Accounting Office (GAO) reported that, of locations where civilians connected to the Department of Defense were stationed abroad, several had “more dependents ... stationed there than service members.”³¹ The GAO’s report, recommending MEJA-like legislation two decades before the act came to fruition, opened by stating, “There is virtually no U.S. civilian or military criminal jurisdiction over the 343,000 U.S. citizen civilian employees and dependents accompanying the U.S.

military forces overseas.”³² Testifying in support of the act in 2000, Assistant Judge Advocate General for the Army Joseph R. Barnes confirmed nearly the same point about more modern contingency operations: “It is not unusual ... for the number of civilians accompanying U.S. forces to actually outnumber the number of military personnel engaged in that operation.”³³

After 2000, the civilian presence with deployed armed forces once again became significant. Although the number of civilian contractors in Iraq was not always clear in Operation Iraqi Freedom,³⁴

the U.S. Central Command was reporting more than 160,000 civilian contractors by August of 2008.³⁵ Between 2007 and 2008, U.S. force levels in Afghanistan drastically increased in response to a strengthening Taliban, by 82 percent from June 2007 to June 2008.³⁶ As noted in the Defense Program Support Reports on contractor support for DOD operations, the number of contractors working in Afghanistan significantly increased along with the U.S. force levels.³⁷ In November, 2008, when Department of Defense operations were ongoing in Iraq and operations in Afghanistan were rapidly increasing, the civilian contractor workforce was at 266,678.³⁸ The Department of Defense had been “criticized for its contracting practices in Iraq, and the accounting of contractor personnel in particular.”³⁹ The U.S. Central Command reported efforts to improve oversight and accountability for civilian contractors, including a memorandum issued by the Deputy Secretary of Defense regarding first responses to allegations that contractors had committed or were the victims of crimes.⁴⁰ In a 2009 article written after his deployment to Iraq, Lt. Col. Charles T. Kirchmaier noted, “The sheer number of contractors living and working on the battlefield alongside our nation’s armed forces suggests that civilian misconduct incidents will likely occur during the course of a unit’s deployment.”⁴¹

While the number of DOD civilian contractors overseas has been steadily declining since 2008, the percentage of civilians in the United States’ deployed force remains significant—enough of a presence to justify vigorous enforcement of extraterritorial criminal jurisdiction over civilians. In 2011, 52 percent of the Department of Defense workforce in Iraq and Afghanistan was made up of civilian contractors.⁴² In January 2014, the Department of Defense reported a total of 99,057 contractors overseas.⁴³ Most of the contractors were in Afghanistan, and the total number of contractors had dropped 27 percent from January 2013, and 35 percent from January 2012.⁴⁴ The ratio of contractors to military in Afghanistan had increased to 1.46-to-1 by January 2014.

Between 2005 and 2009, the Department of Defense had referred 100 cases to the U.S. Attorney’s Office to be prosecuted under MEJA.⁴⁵ Perhaps unsurprisingly, given the pre- and post-enactment focus on civilian misconduct, DOD statistics in late 2009 showed only 7 of those 100 cases involved former members of the armed forces; the U.S. Attorney’s Office had declined to charge or prosecute four of those seven referrals, only one referral was

reported to have resulted in charges or prosecution, and the other referrals were still pending.⁴⁶ The DOJ reported eight total convictions under MEJA since its enactment, including one of a former Army private indicted after discharge.⁴⁷

Noteworthy Prosecutions of Former Armed Forces

In fact, in 2008 and 2009, the DOJ tried two former service members. One trial ended in acquittal and caused many to publically question MEJA's reach over former members of the armed forces.⁴⁸ The other ended in one of the eight MEJA convictions and was lauded as justifying the act's reach.

In November 2006, former Army Private Steven Dale Green was indicted in the Western District of Kentucky on 17 counts, including conspiracy, first-degree murder, felony murder, aggravated sexual abuse of a child, and firearms offenses.⁴⁹ Green had enlisted at the

the indictment in part because Nazario's alleged conduct occurred during combat, something a lay jury would have a difficult time evaluating.⁵⁰ The defense team moved for judgment of acquittal, arguing that the absence of physical evidence was "striking." "Most notably, the government has not produced any corpses, photos of the deceased, or autopsy reports," the defense argued.⁶⁰ On Aug. 28, 2008, the civilian jury found Nazario not guilty on all counts.⁶¹ Jurors reportedly struggled with the complexity of military operations and the task of judging combat actions, calling its role in the case unfair and "a nightmare."⁶²

Eight months later, a civilian jury found former Army Private Green guilty on all counts.⁶³

Encouraged by the conviction of former Private Green and unfazed by the acquittal of Nazario, Assistant Attorney General Lanny Breuer testified in 2011 before the Senate Judiciary Committee

Both factually and mathematically, Santiago's conviction could be seen as exceptional, an anomaly. He is one of only three former service members charged and fully prosecuted under MEJA, and he was the only one of those three whose conduct was actually discovered by a commander and fully investigated while he was still a member of the armed forces.

age of 19 and deployed to Iraq in September 2005, stationed near Mahmoudiya, south of Baghdad.⁵⁰ By December, Green had reported to a combat stress team that he "wanted to kill all Iraqis," and he had been prescribed antipsychotic medication.⁵¹ In March 2006, Green and three other soldiers stationed at the same traffic check point walked to a nearby house intending to rape a 14-year-old Iraqi girl they had seen living there. They killed the girl's family and raped and killed her, burning her body and the home after the crime. Green confessed to his involvement in the crimes shortly after the bodies were discovered, but evidence showed the noncommissioned officer who heard his confession did not report it to the company commander.⁵² While the initial investigative team blamed the killings on Iraqi counterinsurgents, the soldiers' involvement was uncovered on June 20 during a combat stress counseling session with another soldier. FBI agents arrested Green on June 30, 2006.⁵³ Green had been discharged 45 days earlier, cutting off the military's jurisdiction to prosecute him under the UCMJ.⁵⁴ The U.S. Attorney's Office asserted that MEJA "was specifically enacted to prevent the absurdity of allowing people like [Green] to escape any prosecution solely because they happened to have been discharged from the service before their criminal conduct was uncovered."⁵⁵

Before Green's case went to trial, the DOJ indicted and tried another former member of the armed forces, Marine Sergeant Jose Nazario. In June 2007, Nazario was charged under MEJA with involuntary manslaughter, assault with a dangerous weapon, and firearms charges, all related to conduct committed in a 2004 military operation in Fallujah, Iraq.⁵⁶ The indictment alleged that Nazario and other Marines shot and killed four Iraqis they had detained during a firefight in the second battle of Fallujah on Nov. 9, 2004.⁵⁷ Nazario was discharged from the Marines in October 2005 and decorated for valor in connection with his actions during Fallujah battles.⁵⁸ Defense counsel argued that the court should dismiss

that his office—the Criminal Division's Human Rights and Special Prosecutions Section—had been "aggressively" enforcing MEJA. "We have had great success in bringing cases under MEJA, and are committed to continuing to enforce MEJA vigorously," Breuer told the committee.⁶⁴ Former Corporal Santiago was indicted in January 2013.

Anomaly or Trend?

Both factually and mathematically, Santiago's conviction could be seen as exceptional, an anomaly. He is one of only three former service members charged and fully prosecuted under MEJA, and he was the only one of those three whose conduct was actually discovered by a commander and fully investigated while he was still a member of the armed forces. After Judge McMahon's scathing criticism of the use of MEJA against a former service member whose criminal conduct was fully known before he was discharged, the current version of the act may not be long for this world.

Section 3261(d) could be modified to prohibit use of the act against a former member of the armed forces unless the service member ceases to be subject to the UCMJ *and* the service member's conduct that would constitute an offense was not actually discovered by a commander while he or she was still subject to the UCMJ. The frustration Judge McMahon expressed with the bureaucratic inner workings of the Marine Corps legal community suggests an amendment could go even further, beyond conduct "not actually discovered" to include conduct that "should not have been actually discovered with the exercise of reasonable diligence."

Either modification could result in complicated inquiries focusing on conversations, reports, and evidence available only on foreign soil, often in a theater of war. As Breuer testified, even the current requirement that a non-DOD employee's work relate to "supporting the mission of the Department of Defense overseas" results in

complex investigations that can become “extremely challenging and resource-intensive.”⁶⁵ Yet, either modification would better ensure the act is used only when conduct truly does not surface until after discharge from the military.

The irregularity of Santiago’s prosecution is also what makes it significant—the attention Judge McMahon has drawn to the use of MEJA against former members of the armed forces should be important not only to the military legal community and federal prosecutors, but also to the growing force of advocates representing recently returned veterans.

A veteran’s advocate typically focuses on a veteran’s character of discharge for how it impacts his or her access to health care and eligibility for benefits. An honorably discharged veteran has a wealth of options available, in contrast to a veteran with “bad papers,” who has a more difficult road to obtaining treatment and compensation for injuries or diseases incurred in service. To the extent a veteran’s advocate explores an honorably discharged veteran’s conduct committed overseas, it is usually to understand how the veteran’s experiences in combat connect to current physical and mental disabilities. But the prosecution of former Corporal Santiago, as well as other former members of the armed forces, stands as a warning to broaden our awareness beyond substantiating eligibility for benefits and services. Until the act is modified, advocates must be aware that recently returned veterans—even those receiving honorable discharges—may be prosecuted in civilian courts for in-service conduct committed while in uniform overseas.⁶⁶ ☉

Endnotes

¹*United States v. Santiago*, 13 CR 039 CM, Docket No. 72, 2013 WL 6690303 (S.D.N.Y. Dec. 19, 2013) (Post-Hearing Decision on Defendant’s Motions to Dismiss and Suppress). Judge McMahon’s rulings in the *Santiago* case provide exhaustive factual background of the incident, investigation, indictment, and prosecution of Wilfredo Santiago. The judge dismissed a related reckless assault charge due to actual prejudice from the delayed indictment.

²*United States v. Santiago*, 966 F. Supp. 2d 247, 253-54 (S.D.N.Y. 2013).

³*United States v. Santiago*, 966 F. Supp. 2d 247, 254 (S.D.N.Y. 2013). Under 10 U.S.C. § 802(d), while Santiago remained a reservist, he could have been ordered to active duty involuntarily for purposes of court martial. He was not recalled under this provision.

⁴10 U.S.C. § 802(c) (2012).

⁵Sealed Indictment, *United States v. Santiago*, 13 CR 039 CM, Docket No. 1 (S.D.N.Y. Jan. 17, 2013).

⁶Department of Defense, Robert E. Reed, Associate Deputy General Counsel, *Congressional March to Accountability for Civilians Overseas: Filling the Gaps and Crevices*, 7 (Aug. 4, 2009), available at ctip.defense.gov/Portals/12/Documents/DoD%20OGC%20Discussion%20MEJA%20UCMJ%204-Aug%2009.ppt (last checked July 21, 2014).

⁷Sealed Information, *United States v. Ridgeway*, 1:08-cr-00341-RCL, Docket No. 1 (D. D.C. Nov. 18, 2008) (Blackwater security guard charged with voluntary manslaughter and related crimes); Sealed Indictment, *United States v. Slough et. al.*, 1:08-cr-00360 (D. D.C. Dec. 4, 2008) (remaining Blackwater security guards charged with voluntary manslaughter and related crimes, including firearms charges); Jury Verdict, *United States v. Green*, 5:06-cr-00019, Docket No. 259 (W. D. Ky. May 7, 2009).

⁸*United States v. Santiago*, 13 CR 039 CM, 2013 WL 6690303, *20 (S.D.N.Y. Dec. 19, 2013) (post-hearing decision on defendant’s motions to dismiss and suppress).

⁹Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified as amended at 18 U.S.C. §§ 3261-3267 (2012)).

¹⁰18 U.S.C. § 3267(1)(A) (2012). To be subject to the act, these individuals must be either employed by the Department of Defense, or employed by another federal agency to support the Department of Defense’s overseas mission. 18 U.S.C. § 3267(1)(A)(i)-(iii) (2012). They must also be outside the United States in connection with their employment. 18 U.S.C. § 3267(1)(B) (2012). Finally, the definition does not include a national or resident of the host nation, i.e., the nation where the crime was committed. 18 U.S.C. § 3267(1)(C) (2012).

¹¹18 U.S.C. § 3267(2)(A) (2012). To be subject to the act, a dependent must be residing overseas with the member of or person employed by the armed forces. 18 U.S.C. § 3267(2)(B) (2012). This definition also excludes nationals or residents of the host nation. 18 U.S.C. § 3267(2)(C) (2012).

¹²18 U.S.C. § 3261(a) (2012); 18 U.S.C. § 7 (2012) (defining special maritime and territorial jurisdiction).

¹³18 U.S.C. § 3261(a)(2), (d)(1)-(2), (c) (2012). In either case, the act does not disturb a military tribunal’s concurrent jurisdiction.

¹⁴H.R. REP. NO. 106-778, at 7 (2000) (background and need for the legislation) (“Each year, numerous incidents of rape, sexual abuse, aggravated assault, arson, robbery, drug distribution, and a variety of fraud and property crimes committed by American civilians abroad go unpunished because the host nation chooses to waive jurisdiction over these crimes.”); 18 U.S.C. § 3261(b) (2012) (noting that if the United States recognizes the foreign government’s jurisdiction, prosecution in United States courts may proceed only if the Attorney General approves the prosecution.).

¹⁵18 U.S.C. § 3262(a)-(b) (2012). This requirement has several exceptions. First, the act does not require that the accused be delivered into civilian law enforcement custody if the suspect has also been charged with an offense under the Uniform Code of Military Justice. Second, the DOD arresting officer may deliver the accused to foreign authorities in the country where the crime was committed if three requirements are met: (1) the foreign authorities have requested custody in order to try the accused under their country’s laws; (2) the Secretary of Defense has determined those foreign authorities are “appropriate” for the accused to be delivered to; and (3) the United States has entered into a treaty or international agreement that authorizes delivery of the accused to that foreign country. 18 U.S.C. § 3263 (2012).

¹⁶18 U.S.C. §§ 3264(b)(1), (2), (4) (2012). A federal magistrate may order removal to the United States for pretrial detention under Section 3142(e), a Section 3142(f) detention hearing, or for any other reason. If the suspect is not delivered to foreign authorities, the federal magistrate must also conduct the initial appearance pursuant to 18 U.S.C. § 3265(a). The magistrate must determine whether probable cause exists and either order pretrial detention or set conditions for release. 18 U.S.C. §§ 3265(a)(1)(A), (2)-(3) (2012). Because the suspect will likely be in a remote location for this initial appearance, the hearing may be conducted by telephone or video conferencing, so long as all participants, including the suspect’s counsel, may be heard. 18 U.S.C. § 3265(a)(1)(B) (2012).

The Secretary of Defense may order removal to a U.S. military installation if it determines that “military necessity” requires such removal. 18 U.S.C. § 3264(b)(5) (2012). The military installation must be the nearest one “adequate to detain the person and to facilitate the initial appearance described in section 3265(a).” And the accused may insist on removal to the United States for a “preliminary examination under the Federal Rules of Criminal Procedure” if the accused is entitled to that examination and does not waive it. 18 U.S.C. § 3264(b)(3) (2012).

¹⁷18 U.S.C. § 3265(c) (2012).

¹⁸18 U.S.C. § 3266(a) (2012); 32 C.F.R. Part 153 (2013).

¹⁹18 U.S.C. § 3266(b)(1) (2012). Section 3266(b) provides that notice should be given “to the maximum extent practicable,” and that failure to notify a foreign national of the potential for criminal jurisdiction cannot defeat jurisdiction or be raised by the accused as a defense. The limitation on raising lack of notice as a defense applies only to judicial proceedings arising under MEJA. 18 U.S.C. § 3266(b)(2) (2012).

²⁰*United States v. Santiago*, 13 CR 039 CM, 2013 WL 6690303, at *20 (S.D.N.Y. Dec. 19, 2013) (post-hearing decision on defendant’s motions to dismiss and suppress).

²¹H.R. REP. NO. 106-778, at 5 (2000).

²²*Id.* at 7.

²³*Id.* (“Each year, numerous incidents of rape, sexual abuse, aggravated assault, arson, robbery, drug distribution, and a variety of fraud and property crimes committed by American civilians abroad go unpunished because the host nation chooses to waive jurisdiction over these crimes.”).

²⁴*Id.* at 7-8. The report alluded to the ominous circumstance in which a civilian employee could commit a violent crime overseas and, barred from the military installation where he had been employed, return to the United States where he would still go unprosecuted and unpunished for the crime.

²⁵*Id.* at 10.

²⁶*Id.* (“In most, if not all cases, the only reason why these people are living in a foreign county [sic] is because our military is there and they have some connection to it.”).

²⁷*Military Extraterritorial Jurisdiction Act of 1999: Hearing on H.R. 3380 Before the Subcomm. on the Judiciary*, 106th Cong. 25 (2000).

²⁸146 CONG. REC. H6928-02, H6929 (July 25, 2000).

²⁹*Id.* at H6930.

³⁰*Id.* at H6931. In fact, Rep. Betty McCollum (D-Minn.) noted that members of the armed forces were subject to the UCMJ and “usually prosecuted by the military” for any crimes committed overseas. In another hearing, Robert E. Reed, associate deputy general counsel of the Department of Defense, noted: “When military personnel fail to conform to the standards of conduct expected, commanders have a mechanism to respond to these digressions. These options include administrative punishments up to and including a court-martial, depending upon the seriousness of the offense.” *Military Extraterritorial Jurisdiction Act of 1999: Hearing on H.R. 3380 Before the Subcomm. on the Judiciary*, 106th Cong. 18 (2000); see also First Lieutenant James E. Hartney, *A Call for Change: The Military Extraterritorial Jurisdiction Act*, 13 GONZ. J. INT’L L. 2 (2009-2010) (noting legislative testimony and reports for MEJA focused on civilians rather than members of the military).

³¹U.S. GENERAL ACCOUNTING OFFICE, *Some Criminal Offenses*

Committed Overseas by DOD Civilians Are Not Being Prosecuted: Legislation is Needed 5 (Sept. 11, 1979).

³²*Id.* at 4.

³³*Military Extraterritorial Jurisdiction Act of 1999: Hearing on H.R. 3380 Before the Subcomm. on the Judiciary*, 106th Cong. 18 (2000).

³⁴See Marc Lindemann, *Civilian Contractors under Military Law*, PARAMETERS, Autumn 2007, at 83-94, www.army.mil/professionalWriting/volumes/volume5/november_2007/11_07_4.html (“For the first three years of Operation Iraqi Freedom, the U.S. government did not have an accurate count of its contractors and is only starting to determine the approximate number present in today’s Iraq.”).

³⁵DEPT OF DEFENSE, DEPUTY ASSISTANT SECRETARY OF DEFENSE PROGRAM SUPPORT, *Contracting in Iraq and Afghanistan and Private Security Contracts in Iraq and Afghanistan*, August 2008, www.acq.osd.mil/log/PS/archvdc_CENTCOM.html.

³⁶JoAnne O’Bryant and Michael Waterhouse, CONG. RESEARCH SERV., RS22633, *U.S. Forces in Afghanistan* 6 (2008), available at www.fas.org/srgp/crs/natsec/RS22633.pdf.

³⁷DEPT OF DEFENSE, DEPUTY ASSISTANT SECRETARY OF DEFENSE PROGRAM SUPPORT, *Contracting in Iraq and Afghanistan and Private Security Contracts in Iraq and Afghanistan*, November 2008, www.acq.osd.mil/log/PS/archvdc_CENTCOM.html.

³⁸DEPT OF DEFENSE, DEPUTY ASSISTANT SECRETARY OF DEFENSE PROGRAM SUPPORT, *Contracting in Iraq and Afghanistan and Private Security Contracts in Iraq and Afghanistan*, November 2008, www.acq.osd.mil/log/PS/archvdc_CENTCOM.html.

³⁹*Id.* at 1.

⁴⁰*Id.* at 6; DEPUTY SECRETARY OF DEFENSE, *Memorandum, Responsibility for Response to Reports of Alleged Criminal Activity Involving Contractors and Civilians Serving with or Accompanying the Armed Forces Overseas*, Sept. 10, 2008, www.dod.gov/dodgc/images/meja911_criminal.pdf (directing military commanders to “respond promptly” to such reports, noting they had “inherent authority and responsibility” to do so).

⁴¹Lt. Col. Charles T. Kirchmaier, *Command Authority over Contractors Serving with or Accompanying the Force*, THE ARMY LAWYER 35 (December 2009).

⁴²Major Aimee M. Bateman, *A Military Practitioner’s Guide to the Military Extraterritorial Jurisdiction Act in Contingency Operations*, THE ARMY LAWYER 4 (December 2012).

⁴³DEPT OF DEFENSE, DEPUTY ASSISTANT SECRETARY OF DEFENSE PROGRAM SUPPORT, *Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility to Include Iraq and Afghanistan*, January 2014, www.acq.osd.mil/log/PS/CENTCOM_reports.html.

⁴⁴DEPT OF DEFENSE, DEPUTY ASSISTANT SECRETARY OF DEFENSE PROGRAM SUPPORT, *Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility to Include Iraq and Afghanistan*, January 2013, www.acq.osd.mil/log/PS/CENTCOM_reports.html; DEPT OF DEFENSE, DEPUTY ASSISTANT SECRETARY OF DEFENSE PROGRAM SUPPORT, *Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility, Iraq and Afghanistan*, January 2012, www.acq.osd.mil/log/PS/CENTCOM_reports.html. In January 2013, 136,204 contractors were working for the Department of Defense overseas, and in January 2012, 151,995 contractors were working in theater for the Department of Defense. The ratio of contractors to military in Afghanistan was the same in January 2013

and January 2014—1.46 to 1—which was up from a 1.1 to 1 ratio in January 2012.

⁴⁵DEPT OF DEFENSE, ROBERT E. REED, ASSOCIATE DEPUTY GENERAL COUNSEL, *Congressional March to Accountability for Civilians Overseas: Filling the Gaps and Crevices* (Aug. 4, 2009), ctip.defense.gov/Portals/12/Documents/DoD%20OGC%20Discussion%20MEJA%20UCMJ%204-Aug%2009.ppt (last checked July 21, 2014).

⁴⁶*Id.* at 7.

⁴⁷U.S. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, *Accomplishments of the U.S. Department of Justice, 2001-2009*, 38, www.justice.gov/opa/documents/doj-accomplishments.pdf.

⁴⁸*See, e.g.,* Olivia Zimmerman Miller, *Murder or Authorized Combat Action: Who Decides? Why Civilian Court Is the Improper Forum to Prosecute Former Military Service Members Accused of Combat Crimes*, 56 LOY. L. REV. 447 (2010) (arguing that former soldiers accused of crimes committed in combat should be tried by court-martial rather than in civilian court).

⁴⁹Indictment, *United States v. Green*, 5:06-cr-00019-R (W. D. Ky. Nov. 2, 2006).

⁵⁰Brief for Appellant at 4, *United States v. Green*, Nos. 09-6108 & 09-6123 (6th Cir. 2009).

⁵¹*Id.* at 6 n.5.

⁵²*Id.* at 6.

⁵³*Id.* at 10.

⁵⁴*Id.* at 6.

⁵⁵Brief for the United States at 19, *United States v. Green*, Nos. 09-6108 & 09-6123 (6th Cir. 2009).

⁵⁶First Superseding Indictment, *United States v. Nazario*, ED CR 07-127(A)-SGL (C.D. Cal. June 2007).

⁵⁷Complaint for Violation of Title 18, United States Code, Sections 1112, 3238, and 3261(a)(2), *United States v. Nazario*, ED 07-0244M (C.D. Cal. Aug. 6, 2007).

⁵⁸Government's Trial Memorandum at 10, *United States v. Nazario*,

ED CR 07-127(A)-SGL (C.D. Cal. Aug. 13, 2008); Defendant's Motion to Dismiss at 4, *United States v. Nazario*, ED CR 07-127(A)-SGL (C.D. Cal. Aug. 28, 2008).

⁵⁹*Id.* at 19 ("Mr. Nazario's case, on the other hand, is not an ordinary charge of manslaughter, which a lay civilian jury could consider.").

⁶⁰Motion for Judgment of Acquittal at 3, *United States v. Nazario*, ED CR 07-127(A)-SGL (C.D. Cal. Aug. 27, 2008).

⁶¹Judgment of Discharge, *United States v. Nazario*, ED CR 07-127(A)-SGL (C.D. Cal. Aug. 28, 2008).

⁶²*See* First Lieutenant James E. Hartney, *A Call for Change: The Military Extraterritorial Jurisdiction Act*, 13 GONZ. J. INT'L L. 2 (2009-2010).

⁶³Jury Verdict, *United States v. Green*, 5:06-cr-00019, Docket No. 259 (W. D. Ky. May 7, 2009).

⁶⁴*Statement by Assistant Attorney General Lanny A. Breuer of the Criminal Division Before the Senate Judicial Committee* (May 25, 2011), available at www.justice.gov/criminal/pr/testimony/2011/crm-testimony-110525.html.

⁶⁵*Id.*

⁶⁶As capital charges like those brought against Green may be brought "at any time without limitation," a veteran could be indicted under MEJA many years after being discharged from the military. Absent preserved evidence, federal prosecutors would be unlikely to take most cases like these. But nothing in the current act appears to prevent indictment if a program like the Naval Criminal Investigative Service's Cold Case Program used technological advances to re-evaluate evidence preserved in previously unresolved homicide cases. *See* NAVAL CRIMINAL INVESTIGATIVE SERVICE, Cold Case Program, www.ncis.navy.mil/pi/ccp/pages/default.aspx (last checked July 21, 2014).



Get Published in The Federal Lawyer

The Federal Lawyer strives for diverse coverage of the federal legal profession, and your contribution is encouraged to maintain this diversity. Writer's guidelines are available online at www.fedbar.org/TFLwritersguidelines. Contact Managing Editor Sarah Perlman at tfl@fedbar.org or (571) 481-9102 with topic suggestions or questions.